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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 350

WILLIAM DUDLEY PELLEY, PETITIONER

v.

W. BRUCE MATTHEWS, UNITED STATES MARSHAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 12) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 30, 1947 (R. 13). The petition for a writ of certiorari was filed September 16, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the district court for the district in which a prisoner is temporarily in custody, primarily by virtue of a writ of habeas corpus ad prosequendum, may properly decline to entertain a petition for a writ of habeas corpus ad subjiciendum attacking the validity of the judgment under which the prisoner was originally committed.

STATEMENT

On August 12, 1942, petitioner was convicted of sedition in the United States District Court for the Southern District of Indiana, and he was sentenced to imprisonment for 15 years (R. 2). His conviction was affirmed on appeal, 132 F. 2d 170 (C. C. A. 7), and a petition for a writ of certiorari was denied by this Court, 318 U. S. 764.

Petitioner commenced service of his sentence on August 15, 1942, in the United States penitentiary at Terre Haute, Indiana (R. 2). In November 1942, he was brought to the District of Columbia pursuant to a writ of habeas corpus ad prosequendum to be tried on an indictment charging him and others with conspiracy to engage in subversive activities (R. 3, 9). That indictment was dismissed on December 2, 1946, and the Government took an appeal from the order of dismissal (R. 9). See *United States* v. *McWilliams,* No. 9438 (App. D. C.), decided June 30, 1947.

In January 1947, while that appeal was pending, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia, attacking the validity of his conviction in the district court in Indiana on the grounds that women were systematically excluded from the panels of grand and petit jurors in that court, that the indictment on which he was convicted charged no offense, that the evidence failed to establish an offense, that the trial court was hostile to petitioner, and that the court improperly charged the jury and permitted the United States Attorney to make an inflammatory argument (R. 2–7).

An order to show cause issued (R. 8), and respondent filed a response in which he contested the jurisdiction of the district court for the District of Columbia to consider the petition on the ground that petitioner was being held in that district under the writ of habeas corpus ad prosequendum (R. 8–9). The district court thereafter discharged the rule to show cause and dismissed the petition (R. 10). On appeal, the order of the district court was affirmed (R. 13), the Court of Appeals adhering to its earlier ruling in *Noble* v. *Botkin,* 153 F. 2d 228, certiorari denied, 325 U. S. 888, that the district court has no jurisdiction to entertain a petition for a writ of habeas corpus attacking the petitioner's original conviction while the petitioner is held in the juris-

diction solely by reason of a writ of habeas corpus ad prosequendum (R. 12). On the same day the Court of Appeals affirmed the order of the district court dismissing the indictment in the District of Columbia sedition case. *United States* v. *McWilliams, supra.*

ARGUMENT

1. Since proceedings in the sedition prosecution, for which petitioner was brought to the District of Columbia, have been concluded, the cause of his detention in that district no longer exists. Were it not for the pendency of the instant petition for a writ of certiorari, petitioner would by now have been returned to the penitentiary designated as the place for service of his sentence. Under the circumstances, therefore, there is no reason why his petition for a writ of habeas corpus attacking his conviction in Indiana should be heard in the courts of the District of Columbia.

As we pointed out in our brief for the respondent in opposition in *Noble* v. *Botkin,* No. 1288, O. T. 1944, the district court for the district in which a defendant is temporarily in custody, primarily by virtue of a writ of habeas corpus ad prosequendum, may properly decline to consider a writ ad subjiciendum when the application for the writ may more appropriately be made in the district designated as the place of confinement under the original judgment. See *Sanders* v. *Brady,* 57 F.

Supp. 87 (D. Md.). Such a policy is no more a limitation on the writ of habeas corpus than is the policy of federal courts not to entertain a petition attacking a state conviction until state remedies have been exhausted,[1] or the policy of federal appellate judges to decline to act on petitions which may with equal facility be presented to a district court.[2] The habeas corpus statute (28 U. S. C. 452, ff) does not "deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it." *Ex parte Royall*, 117 U. S. 241, 251.

It is unnecessary here to consider whether, under special circumstances, such as prolonged prospective presence in the district to which the petitioner has been removed for trial, there may be valid reasons for departing from such policy. Whatever may have been the situation before the sedition case in the District of Columbia was concluded, no such special circumstances now exist. Only the pendency of his instant petition for certiorari prevents petitioner from seeking relief in the district designated as the place for service of his sentence.

2. Independently of the foregoing considerations, the order of the district court dismissing

[1] *Ex parte Hawk*, 321 U. S. 114, 117.

[2] *United States* v. *Hill*, 71 F. 2d 159 (C. C. A. 3); *Sweetney* v. *Johnston*, 121 F. 2d 445 (C. C. A. 9), certiorari denied, 314 U. S. 607.

the petition for a writ of habeas corpus may be sustained on the ground that petitioner presented no issues cognizable on habeas corpus. His petition in part merely reiterates contentions which were resolved against him on his direct appeal from his conviction, and in part alleges other trial errors which are not subject to review on habeas corpus. See *Sunal* v. *Large,* No. 535, O. T. 1946, decided June 23, 1947.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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